of liability and that proceedings were only contemplated in certain circumstances. Birkett J. in his judgment at page 102 said:

"... . where there is a statutory requirement of this kind, it must be pretty strictly fulfilled. There is no evidence really before me that the defendants in this case ever did have notice of the proceedings, either before or within seven days after they had been brought. What they did have was an intimation that in certain circumstances proceedings might be brought, but not necessarily that they would be brought. This point has been called a technical point, and I suppose it is, but I think I must come to the conclusion upon the technical matter that the requirements of section 10 have not been fulfilled inasmuch as the insurer did not have notice of the bringing of the action."

In the Ceylon case the letter written by the respondent to the appellant company read thus:

"unless our client's claim is settled on or before the 31st instant, we are instructed to file action against the owner of the car."

As both letters threatened that legal proceedings would be filed the effect of the words "unless ... we receive a written admission of your liability" in the last paragraph of the said letter in this case was, in my view, the same as the words "unless our client's claim is settled" in the Ceylon case and just as the letter in the Ceylon case was held to be so I hold that the said letter in this case was also sufficient notice. The said letter was not a mere notice of claim and the legal proceedings threatened therein unless liability was admitted could not be said to be a contingent or conditional threat.

In *China Insurance Co., Ltd.*, v. *Ng Siak Yow & Ors.*[3] at page 245, the material portion of the plaintiff's letter dated 16th June, 1958, was in the following terms:

"We are instructed to claim damages from you in respect of our client's injuries. Please let us know if liability is admitted."

In his judgment Gill J., as he then was, at pages 245-246 said:

"To my mind this was nothing more than an intimation that a claim was being made and an inquiry as to whether liability was admitted. It is to be observed that in the *Thambugala* case there was a proper notice of action. I therefore cannot see how it can possibly be argued that a decision in that case helps the respondents in this case. Section 80(2)(a) contemplates the giving of notice of the proceedings in which the judgment was given. In my opinion there can be no notice of such proceedings unless it is stated in unequivocal terms that the parties intend to file an action for the recovery of damages. The notice in this case was not a notice of action but a notice of claim, which is not the same thing as a notice of action."

Further on he said:

"If the letter in this case had gone on to say that action would be brought if liability was not admitted or no reply given by a certain date or within so many days, or words to that effect, it would have been a proper notice."

Though the second passage quoted above is *obiter* I respectfully agree with and adopt the view expressed by the learned judge.

In *Halsbury's* Laws of England, Third Edition, Volume 22, at page 376, the law is summarised thus:

"The notice must be of sufficient formality to be understood by a reasonable man as an intimation of legal proceedings, but no particular formality is required".

As admitted by counsel for the plaintiff the said letter was not an ideal notice but it nevertheless was in my view of sufficient formality to be understood by a reasonable man as an intimation that legal proceedings were to be taken against the insured person.

I therefore give judgment for the plaintiff against the defendants in the sum of $47,817 and costs.

Judgment for the plaintiff.

Solicitors: *Wrigglesworth & Co.; Hilborne & Co.*

UDHAM SINGH v. INDAR KAUR

[F.C. (Azmi L.P., Ismail Khan C.J. (Borneo) & Pawan Ahmad J.) September 8, 1971]

[Kota Kinabalu—Federal Court Civil appeal No. 69 of 1970]

Wills and Trust — Will — Probate — Allegation that testator had no testamentary capacity — Onus of proof.

In this case the appellant had applied for revocation of the grant of probate and there had been an order directing a trial to determine the validity of the will. The appellant alleged that the testator had no testamentory capacity and that he did not have the requisite knowledge and approval of the said will. At the time of making the will the testator was a patient in hospital and had suffered from strokes.

The learned trial judge pronounced in favour of the will as he decided that the plaintiff/appellant had failed to discharge the onus of establishing testamentary incapacity on the part of the testator. The appellant appealed.

Held: the learned trial judge was wrong in putting the burden of proving testamentary incapacity on the appellant. It is clear law that the burden of proving testamentary capacity rested on the person alleging the validity of the will. In the circumstances a retrial should be ordered.

Cases referred to:-

(1) *Banks* v. *Goodfellow* (1870) L.R. 5 Q.B. 565.
(2) *Smee* v. *Smee* (1879) 5 P.D. 84 at p. 91.
(3) *Tyrrell* v. *Painton* (1894) P. 151.
(4) *Pickup* v. *Thames and Mersey Marine Insurance Co. Ltd.* (1877-78) L.R. 3 Q.B.D. 594.

FEDERAL COURT.

Dato A. Nahappan for the appellant.

Shelley Yap Yeok Siew for the respondent

Cur. Adv. Vult.

Ismail Khan C.J. (Borneo): One Dewa Singh Maan (hereinafter called the testator) had served in the Police Force, Sabah for many years. At the time of his death he was possessed of considerable property. Apart from his own language, he knew English and Malay.

In 1961 he was taken ill and was admitted in hospital in early March of that year at Kota Kinabalu. There is no evidence to show if he was ill and if he was for how long before his admission.

In hospital he had two strokes. The first was apparently not severe. The second was thought to be serious enough for him to be removed on the 15th March, 1961 to the Gleneagles Hospital, Singapore. Dr. Gethin-Jones who attended to him found that he was suffering from a right-sided hemiplegia with aphasia. There was also a diagnosis of cerebral thrombosis, left middle cerebral artery. His general condition was very good and he could reply to questioning.

Professor G. A. Ransome of the General Hospital, Singapore, confirmed the diagnosis.

On the 24th March, 1961, the testator complained of headaches and was drowsy. This condition continued over the next few days. On the 26th March, 1961, he made his will. On the 27th March, 1961, his drowsiness was less; he was taking more food. On the 28th there was a relapse. He developed hypostatic pneumonia. His condition became worse and at 8.30 p.m. on the 2nd April he died.

He had two wives, the first predeceased him. By this wife he had a son, the appellant and a daughter, one Mohinder Kaur. By his second wife, the respondent, he had three sons:

(1) Karam Singh; (2) Golbalakal Singh; (3) Godet Singh; and a daughter, Herminder Kaur.

By his will he left all his property to the respondent. Nothing was given to any of the children.

Probate of the will was granted to the respondent on the 27th of April, 1962 in common form.

In March 1969 the appellant applied to court for a revocation of the grant of probate. There was an order directing a trial to determine the validity of the will.

In his statement of claim the appellant alleged that the testator had no testamentary capacity and that he did not have the requisite knowledge and approval of the said will. There was a further allegation of undue influence on the part of the respondent and Golbalakal Singh or both of them.

The particulars in the statement of claim disclose that "because of his illness the testator's faculties were greatly impaired and that he was incapable of forming the intent communicating his desire of possessing the physical ability to make a will." The defence denied the allegations.

At the trial evidence was given of the circumstances attending the execution of the will.

Briefly, the evidence of the nurse at the hospital, one Mrs. Stewart, was that on the 26th of March the testator was considered comfortable and he was conscious, but there was no response, if anything, was said to him. In the testator's room she was with the respondent on one side of the testator while Golbalakal Singh and a lawyer were on the other side. Golbalakal asked the testator if he wanted to leave all his property to the respondent. There was no reply. The lawyer was not prepared to go on, but was pressed by Golbalakal to make another attempt. There was no response but Golbalakal with the assistance of the lawyer managed to get the testator's thumbprint on the will. On the other hand, Golbalakal Singh said the testator shook his head when he was asked if he had made a will. He then nodded when questioned if he wanted to make one. Mr. Tan Teck Chuan the lawyer said he believed the testator could hear him. To make sure he wrote on a piece of paper the words: "I am a lawyer. Do you want to make a will?" The testator nodded his head. He showed the testator a will, but there was no response. He then read out the will. Testator again nodded. He followed this up by showing him a piece of paper with the words: "Do you want to leave all your property to your wife?" The testator nodded. In reply to a question about his children the testator shook his head. Mr. Tan said that he and one Eddie Chung signed as witnesses.

The judge accepted the evidence of Mr. Tan as regards the execution of the will. There was some evidence from Mrs. Stewart regarding the testator's condition from the time of his admission until the date of his death.

The report of Dr. Gethin-Jones was put in. It reads as follows: —

"This patient arrived in Gleneagles Hospital, Singapore, by air from North Borneo at 8.20 p.m. on March 15, 1961.

On examination, he was found to be suffering from a right sided hemiplegia with aphasia and the diagnosis of cerebral thrombosis, left middle cerebral artery, was made.

His general condition was very good and he could reply to questioning by nodding his head.

Next day the diagnosis was confirmed by Prof. G.A. Ransome of the General Hospital, Singapore.

Over the next week his general condition remained good and his right arm showed some response to physiotherapy.

On March 24th he complained of headaches and became drowsy; this continued over the next few days.

By March 27th his drowsiness was less and he was taking more food.

On March 28th, however, he relapsed again and developed a hypostatic pneumonia. His condition gradually worsened and on April 2nd was comatosed, which during the day deepened, and he died at 8.30 p.m. that evening.

I was not present when the deceased executed a will on March 26, 1961, but his condition was such that there would be periods of drowsiness and periods when he could be roused.

His general mental condition when in Gleneagles Hospital could not be assessed because of his aphasia but this could be determined by his doctors in Jesselton prior to his illness."

The learned judge appeared to be strongly influenced by the view expressed in paragraphs (3) and (5) of Dr. Gethin-Jones' certificate which reads as follows: —

"(3) His general condition was very good and he could reply to questions by nodding his head.

(5) Over the next week his general condition remained good and his right arm showed some response to physiotheraphy."

He preferred the evidence of Dr. Gethin-Jones' report as to the testator's physical condition to Mrs. Stewart's evidence.

In the event, the learned judge pronounced in favour of the will as he decided that the plaintiff had failed to discharge the onus of establishing testamentary incapacity on the part of the testator.

In this appeal, the appellant was correct in his submission that the judge was wrong in placing such an onus on the plaintiff. The plaintiff by his pleadings had clearly raised the issue as to testamentary capacity. A person has testamentary capacity when he understands the nature of his act and its effect; the extent of the property of which he is disposing; the

claims to which he ought to give effect; and, with a view to the latter object, no disorder of the mind must poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties, and no insane delusion must influence his will in disposing of his property, and bring about a disposal of it which, if the mind had been sound, would not have been made. (*Banks* v. *Goodfellow*[1]). Once this point was taken, it is clear law that the burden of proving testamentary capacity rested on the defendant. (See *Smee* v. *Smee*[2]). There was therefore a misdirection on the part of the judge in putting the burden of proving testamentary incapacity in the first instance on the appellant. The question is whether in the circumstances I should order a retrial.

It was argued for the appellant on the authority of *Tyrrell* v. *Painton*[3] that in this case the court could, where the facts are clear and not in dispute, pronounce against the validity of the will. I have studied the case carefully and it appears to me that it is not quite on all fours with the instant case. In *Tyrrell* v. *Painton*[3] the testatrix made a will dated the 7th November 1892 in favour of the plaintiff. He claimed probate in solemn form of this will (hereinafter called the first will.) The defendants J. R. Painton and J. Painton by their defence alleged that the first will had been revoked by a will dated the 9th November 1892 (hereinafter called the second will.) In his reply the plaintiff alleged that the second will was obtained by fraud and that the testatrix when she executed the second will did not know of and approve of its contents.

The judge held that the burden of proving that the second will was obtained by fraud was on the plaintiff and as he had not succeeded in doing so he held in favour of the second will. On appeal it was held that the judge was wrong in addressing himself only to the question of fraud. He had failed to consider the suspicious circumstances under which the second will was made. The suspicious circumstances were that the second will was prepared by a son of the family leaving all the property to him (the defendant). The attesting witnesses were with the defendant's son and a young friend of his. The testatrix was not in good terms with the Painton family and on days after the execution of the second will had not relented towards the defendant.

In the instant case there is only one simple will by which the testator left all his property to the respondent. There was no allegation of fraud. The main issue was whether the testator had a free disposing mind. Only when this was established by the respondent on whom lay the *onus probandi* could one proceed to deal with the other issue (undue influence). I find that the learned judge did address his mind to the issue of testamentary capacity. But he was in error when he put the onus on the wrong party. He said "the onus was on the plaintiff to show that the deceased had no testamentary capacity. The plaintiff must take the consequences if he elected to call no medical evidence other than Mrs. Stewart's." I think the learned judge meant no medical witness as there is other medical evidence in the report of Dr. Gethin-Jones. This states that the testator's mental condition at Singapore could not be assessed because of his aphasia, but this could be determined by his doctors in Jesselton prior to his illness. Again, the judge referred to plaintiff's letter to the defendant about a medical report on the testator from the Queen Elizabeth's Hospital, Jesselton. Speaking of his letter the judge said: "Neither was the medical report from Queen Elizabeth's Hospital put in . . . I think I am entitled to take the view that the evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it." He held that the plaintiff had withheld this report.

It was also contended for the appellant that the judge had failed to consider the suspicious circumstances under which the will was made, *viz*:

(i) "That the deceased had two strokes in Jesselton before he was taken to Singapore.

(ii) That he suffered from right hemiplegia (paralysis from head to foot on the right side) in Jesselton.

(iii) That he suffered from aphasia *i.e.* damage to brain and loss of speech in Jesselton and that he could only reply to questioning by nodding his head.

(iv) That he suffered from cerebral thrombosis.

(v) On the deceased's arrival in Singapore the above illnesses were diagnosed and confirmed by Professor G.A. Ransome, who was attending to the deceased at the Gleneagles Hospital from time to time. However, the deceased was under the personal care of Dr. Gethin-Jones.

(vi) On March 24, 1961 deceased had a relapse of thrombosis and became drowsy; this continued for the next few days.

(vii) On 26th March, 1961 deceased's condition was such there would be periods of drowsiness and periods when he could be roused.

(viii) On the afternoon of 26th March, 1961 the deceased's condition got worse. He got into unconsciousness on and off. He was given oxygen and placed in oxygen tent where he remained until he died on 2.4.1961."

These circumstances relate only to his physical condition. The judge did consider them, but appeared to attach more weight to Dr. Gethin-Jones' finding that the testator's general condition was very good and he could reply to questioning and that this continued for the next week except that he had headaches and he was drowsy on the 26th March, 1961, the day when the will was executed. The judge also stressed the point that according to Dr. Gethin-Jones the deceased's mental condition could not be assessed and could be determined by his doctors in Jesselton (Kota Kinabalu). According to the judge it was for the appellant to establish it.

It was also suggested by the appellant that no consideration was given to the following circumstances:

(ix) "Deceased's son Golbalakal got panicky and thought of making a will of his father and after discussion with his mother, he got the will done.

(x) The will was done with the knowledge and approval of the mother and she was made the absolute and sole beneficiary of the will. Though she did not take active interest in preparing the will, she was never theless a participant in getting the will done.

(xi) Though the will was done in the hospital no attempt was made to get the opinion of Dr. Gethin-Jones or Professor Ransome as to whether the deceased was in a fit condition to make a will. Neither of these

doctors was called to examine the deceased before executing the will.

(xii) Nor the propounder of the will called any member of the hospital staff to give evidence on the mental capacity of the deceased or the valid execution of the will. Nor was any hospital staff asked to be a witness to the will.

(xiii) The deceased did not put his thumbprint voluntarily. It was physically placed on the will by the son with the help of the solicitor.

(xiv) The will was deliberately concealed by Golbalakal and the defendant after the death of the deceased.

(xv) Golbalakal eventually told the truth about the will to appellant. He admitted that deceased did not know anything about the will and said 'That will 'we' had done it.' 'We' meaning he and his mother. He also said "We wanted the property to be in one hand" to avoid trouble between brothers. 'We' again referring to himself and his mother. There is no conflict on this evidence because it had not been contradicted.

(xvi) Again, Golbalakal had admitted to Haji Omar (P.W.4) that his father did not know about the will as his father was very seriously ill. He also said his father did not know about the thumbprint. There is no conflict on this evidence as well because it was not controverted."

I find that the judge had assessed them but only in the context of the plea of undue influence, and had come to the conclusion that there was no undue influence. The onus should have been on the respondent to explain them before the matter of undue influence could be dealt with.

It seems to me that these errors stem from a wrong approach to the question of onus.

The last point for consideration is the question of a retrial.

The relevant case is *Pickup* v. *The Thames and Mersey Marine Insurance Company, Limited.*[4] This was an action on a policy of insurance on a cargo of rice on board ship, *Diadem*, on a voyage from Rangoon to the United Kingdom. Eleven days after she had started on the voyage, she encountered severe squalls, heavy sea and made so much water that it had to be put back to Rangoon.

The judge directed the jury that the time which elapsed between setting sail and putting back was sufficiently short to shift the onus from the underwriters (the defendants) and make it encumbent on the assured (plaintiff) to prove that the unseaworthiness arose from causes occurring subsequently to setting sail.

It was held that this was a misdirection as "it placed a much heavier burden upon the plaintiff... and consequently the plaintiff instead of undertaking a burden of proving a loss by peril insured against upon a ship which at all events is not presumed to be unseaworthy... was undertaking a burden of proving that loss in respect of a ship which according to the judge's direction was presumably unseaworthy when it started." A new trial was ordered.

In the instant case the misdirection resulted in a substantial wrong in that the appellant had, as I pointed out earlier, to undertake on an issue as to testamentary capacity the burden which was not on him of proving, in the first instance, testamentary incapacity.

There will be an order for a new trial.

The costs of this appeal and the costs of the first trial should follow the event of the new trial.

Azmi L.P. and **Pawan Ahmad J.** concurred.

New trial ordered.

MAHON v. MAHON

[F.C. (Ong C.J. (Malaya), Ali F.J. and Chang Min Tat J.) September 9, 1971]

[Ipoh — Federal Court Civil Appeal No. 32 of 1971]

Family Law — Divorce — Whether wife "ordinarily resident" in Malaysia — Divorce Ordinance, 1952, s. 49(1)(b).

This was an appeal from the decision of the High Court in Penang ([1971] 1 M.L.J. 287) which had dismissed a petition for divorce on the ground that the petitioner was away in Ireland during fifteen months of the three years immediately preceding the filing of the petition. The parties were domiciled in Ireland but they have had their matrimonial home in the Federation for the past fifteen years.

Held, allowing the appeal: in the circumstances there can be no doubt that the petitioner had been "ordinarily resident" in the Federation since 1955.

Cases referred to:-

(1) *Hopkins* v. *Hopkins* [1950] 2 All E.R. 1035.

(2) *Levene* v. *Commissioners of Inland Revenue* [1928] A.C. 217, 222.

(3) *Fox* v. *Stirk* [1970] 3 All E.R. 7.

FEDERAL COURT.

Lim Kean Siew for the appellant.

S. Thillaimuthu for the respondent.

Cur. Adv. Vult.

Ong C.J. (Malaya): The wife's petition for divorce was dismissed by the High Court in Penang on the ground that she was away in Ireland during 15 months of the 3 years immediately preceding the filing of the petition. She now appeals against such decision.

The parties' domicil is Ireland. The court's jurisdiction to entertain proceedings by the wife, therefore, rests on section 49(1)(b) of the Divorce Ordinance 1952, that is to say, "if the wife is resident in the Federation and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings".

From facts disclosed in the petition and on inspection of the petitioner's passport, the judge found that the petitioner was not "ordinarily resident" in the Federation during two periods of her absence in Ireland, totalling about 15 months, within the three years preceding the commencement of the proceedings. He accordingly held, following *Hopkins* v. *Hopkins*,[1] that the court should not arrogate to itself jurisdiction to decide on a matter affecting status and dismissed the petition.

With respect I think the learned judge appears to have overlooked the fact that immediately after their marriage in Ireland on July 4, 1955 the parties left for Malaya and have for the past 15 years had their matrimonial home in the Federation. In the